Wage and Hour DOL Audits: Surviving Heightened Scrutiny on Pay Practices
Preparation for Investigations of Minimum Wage, OT, Hours Worked and Misclassification; Leveraging Settlement Techniques

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1pm Eastern  |  12pm Central  |  11am Mountain  |  10am Pacific

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Wage and Hour DOL Audits: Surviving Heightened Scrutiny on Pay Practices

Webinar
Wednesday, February 25, 2015
1:00pm ET/12:00noon CT/11:00am MT/10:00am PT
DOL’s Wage & Hour Enforcement Initiatives
DOL’s Enforcement Initiatives

The DOL’s 5-year Strategic Plan Focuses on Compliance

- The DOL is continuing its “Plan/Prevent/Protect” compliance program that requires employers to “find and fix” violations before the DOL comes knocking on the door.
- Employers are expected to develop self-audit programs, compliance action plans and follow-up analyses as part of ongoing compliance.
- DOL has promised to get tough on noncompliant employers.
DOL/WHD Enforcement Initiatives

Specific strategic goals include:

- “Detect and deter” employers who misclassify employees as independent contractors.
- Protection of “vulnerable workers” in “high risk industries.”
- Empowering employees with tools and resources to document and report employer noncompliance.
  - “We can help” campaign
  - DOL “smartphones” app
  - “Bridge to Justice” campaign
DOL/WHD Enforcement Initiatives

- **New Strategies in DOL Enforcement:**
  - Coordinated efforts with other administration agencies, such as: IRS, OFCCP, and EEOC
  - Limitations on use of employee waivers
  - Broadening scope of compliance audits to include:
    - Audits extending beyond original complaint/issue
    - Multiple employer sites
    - Corporate affiliates
    - Any and all compliance areas covered by DOL/ other federal agencies
The Fair Labor Standards Act
Efforts to Target Misclassification Issues
Potential Areas of Concern for Employers

- “Employee” or Independent Contractor?
- Exempt or Non-Exempt under the Fair Labor Standards Act?
The Department has entered into agreements with multiple states to reduce employee misclassification and improve compliance with Wage and Hour laws.

In September 2014, the U.S. DOL awarded $10.2 million to 19 states to help finance the state unemployment insurance tax programs to identify employers that misclassify employees as independent contractors or fail to report wages paid to workers.
Industries Targeted

- According to a 2014 NELP survey, the industries with the most prevalent instances of misclassification of workers are:
  - Construction;
  - Real Estate;
  - Home Care;
  - Trucking;
  - Janitorial; and
  - High-tech jobs.

- In April 2010, the Secretary of Labor formally announced targeting specific industries with low wage workers, including:
  - Construction; Janitorial Work; Hospitality; Food Services; and Home Health Care.

- May not be your clients!
Economics Reality Test

- An “employee” is an individual who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves
  - No single rule of test controls, rather whether an individual is an employee or independent contractor depends on the total activity

- Common factors used to determine if an individual is an independent contractor or an employee:
  - Whether the services provided are an integral part of the business
  - The permanency of the relationship
  - The amount of the IC’s investment in facilities and equipment
  - The nature and degree of control by the “employer”
  - The IC's opportunities for profit and loss
  - The amount of initiative, judgment, or foresight in open market competition with others required for the success of the IC
  - The degree of independent business organization and operation
In 2011, the DOL and the IRS signed a Memorandum of Understanding stating that the agencies will work together and share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and improve compliance with federal labor laws.

- This MOU has established a practice whereby DOL misclassification cases will normally get referred to the IRS after the investigation closes.

Unlike in the past, employers need to be especially careful because violations under one agency may lead to additional investigations in other agencies due to information sharing.
Available for taxpayers that want to voluntarily change the prospective classification of workers from independent contractors or other non-employees to “employees”

- Eligibility Requirements
  - Must have consistently treated the workers as independent contractors or other non-employees;
  - Cannot currently be under an employment audit by the IRS or the DOL; and
  - If the employer was previously audited by the IRS or DOL, the employer must have complied with the prior order.
Other Pay Practices Under US DOL/WHD Scrutiny
Other Pay Practices Under US DOL/WHD Scrutiny

- Aggregation of Hours for Joint Employment
- Meal Periods/Automatic Deductions
- Overtime calculations for “Non-Discretionary” Bonuses and Incentives
- Smartphones, emails and other communication devices
- Other “Off-The-Clock” Work
Meal Periods

- Federal law requires employees receive full compensation for meal periods, unless:
  - Employee gets full 30 minute break
  - The employee can use the meal period for his/her own benefit
  - The meal period is not “meaningfully interrupted”
- Employers utilizing payroll systems which automatically deduct meal periods from worked shifts receive the highest scrutiny from the DOL (and class action attorneys).
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- Employers must ensure meals of are not “meaningfully interrupted” by:
  - Answering employee/customer calls and questions
  - Monitoring work during meal
  - Carrying smartphones, pagers and other communication devices
Other Pay Practices Under US DOL/WHD Scrutiny

- **Off-The-Clock Work**
  - Employees must receive minimum wage for all hours worked and overtime for hours worked over 40 hours in a workweek.
  - Failure to police off-the-clock work can result in significant employer liability.
    - Preliminary work
    - Postliminary work
    - Travel time
    - Training/Education
Off-The-Clock Work

• Employers must account for all worked hours including:

  > Work at Home:
    – Returning pages
    – Checking email
    – At-home training modules

  > Carrying/Monitoring Pagers/Communication Devices
    > Vocera lawsuits
    > Active monitoring of work
    > Interruption of meal periods/required breaks
Other Pay Practices Under US DOL/WHD Scrutiny

- **Joint Employment:**
  - Two or more related employers that share “common control” of a single worker will be deemed individually and jointly liable for the payment of minimum wage and overtime on aggregated hours worked for the employers in a single workweek.
    - Applies to:
      - Affiliated corporate entities (50% ownership)
      - Temporary staffing agencies
Joint Employment:

- All hours must be aggregated for purposes of determining whether employee has worked more than 40 hours per week
- Regular rates must be blended to determine overtime rate
- Employees CANNOT be both:
  - Exempt/Non-exempt
  - Employee/Contractor
  - Paid Overtime 40 hours/ 8 & 80
Other Pay Practices Under US DOL/WHD Scrutiny

- **Bonuses & Incentives**
  - The FLSA allows for just seven types of bonuses to be excluded from the regular rate.
  - All other incentives/bonuses must be added to the regular rate and used to recalculate overtime compensation, including the following:
    - Hiring bonuses
    - Retention bonuses
    - Transition bonuses
    - Lump sum bonuses
    - Perfect attendance bonuses
    - Longevity pay
    - Service bonuses
Bonuses & Incentives

- General Rule: Bonuses which are paid on a regular and consistent basis and/or are communicated to employees in advance of payment are typically non-discretionary bonuses which must be included in the regular rate for purposes of calculating overtime.
Exempt vs. Non-Exempt Employees

- **Exempt**
  - White Collar Exemptions
    - Executive, administrative, professional, outside sales, computer employees
      - Must be paid at least $23,600 per year ($455 per week) on a salaried basis; and
      - Must perform exempt job duties.
  
- If non-exempt, the employee is entitled to overtime.

- The fluctuating workweek method of payment can be helpful during settlement discussion if a worker is misclassified as exempt.
U.S. DOL/WHD Audit Process
Preparation Before a DOL Investigation

- Employers may decrease potential liability for wage and hour issues by conducting self-audits before the DOL gets involved.

- In order to conduct a comprehensive self-audit, employers should:
  - Closely examine job descriptions to ensure they reflect the work performed;
  - Review time keeping systems, pay policy, and maintain FLSA records;
  - Develop a formal employee grievance program for reporting and resolving wage hour concerns;
  - Confirm that all written time keeping procedures are current, accurate, and complied with;
  - Conduct employee self-assessments regarding job duties; and
  - Develop a centralized system for retaining independent contractors.
Best Practices When Confronted with a DOL Investigation

- Develop an inspection team and designate a DOL point person
  - The inspection team typically includes a member of senior management, field supervisors, and wage and hour counsel
- Consent to an investigation instead of demanding a subpoena
- Be Aware and assert employer rights during DOL Investigations
  - Refusing to allow the DL investigator on site without a warrant
  - Requesting 72 hours to comply with investigative demands
  - Requesting that interviews and on-site inspections take place at reasonable time
  - Participating in the opening and closing conferences
  - Protecting trade secrets and confidential business information
  - Escorting the investigator while he or she is at the workplace
Stages of DOL Audit: Opening Conference

- Common topics discussed by the investigator in the opening meeting are:
  - the purpose and scope of the investigation;
  - inform the employer of what documents and records they will review; and
  - advise whether they plan to interview any employees.

- Investigators may request a tour of the facilities being investigated
  - normally to ensure that the employer is complying with notice requirements

- If not previously requested, the Investigator will likely request payroll records from the previous 2-3 year period, and all written policies, practices, and procedures regarding time-keeping
Stages of DOL Audit: On-Site Inspection

- An investigator may conduct a tour or perform an on-site inspection of the employer’s facility
  - The team leader or a member of the investigation team should escort the investigator around the premises at all times the investigator is conducting the on-site inspection.
- Investigators may speak with hourly employees and hand out business card to set up employee interviews
- The employer may object to any impromptu on-site interviews that last more than 5 minutes because they can assert that this practice would disrupt normal business operations
  - Best Practice for Employee interaction during an on-site inspection
    - The person escorting the investigator should take diligent notes regarding which employees the investigator speaks to, the subjects of the investigator’s questions, and any employee that the investigator requests to interview.
Stages of DOL Audit: Employee Interviews

- An investigator has the right to conduct employee interviews and can interview the employee in private.
- At the employee’s discretion, the employee may refuse to be interviewed or request that a representative of the employer be present during the interview.
- Management and key employees do not have corresponding privacy rights during an interview and the employer may insist that counsel or another management official attend management interviews.
- Interviews should be scheduled in advance and the DOL must be reasonable in its response to time and location requests.
Stages of DOL Audit: Closing Conference and Post-Investigation Considerations

- The Closing Conference occurs at the conclusion of an investigation to inform an employer of its findings and seek an agreement if there are any violations.

- Best Practices for the Closing Conference:
  - While an employer is expected to respond at the closing conference, an employer may defer any statements and remain silent.
  - The employer should:
    - Avoid agreeing to any observation of a violation, admitting guilt, or making any promises;
    - Consider reviewing the findings to rebut or verify the back wage computations and possibly submit a position statement;
    - Disclose any changes the employer made proactively to remedy alleged violations;
    - Scrutinize the characterization of the violation and the penalty amounts; and
    - Look for factual errors that form the basis of the proposed violation.
Options for Clients at the End of the Auditing Process

- After the DOL presents its findings to the employer, the employer can:
  - Negotiate a settlement with the agency; or
  - Litigate the claims
    - If an employer refuses to pay the agency, the solicitor’s office will determine whether or not to further pursue the claims in district court.
Damages

- Back wages in the amount of unpaid minimum wages or unpaid overtime compensation
- Liquidated damages, paid to the employee, equal to the amount of unpaid wages due to the employee
- Employers that willfully or repeatedly violated minimum wage or overtime requirements can face up to $1,000 in civil penalties for each violation
  - Intended to discourage future non-compliance and are not tied to the amount of back wage liability incurred as a result of the violation.
  - Civil penalties are paid to the government.
State Wage and Hour Law Compliance
Industries Targeted by the NYS DOL

Focus on the Construction Industry

- According to the NYS DOL, research and statistics indicate that the construction industry has among the highest rates of misclassification of workers, leading the NYS DOL to continue targeting the construction industry for audits.

In 2014, New York State passed the New York State Commercial Goods Transportation Fair Play Act, similar to a law regulating the construction industry for misclassification of workers, because of the high rate of classification of workers as independent contractors

- In an effort to decrease misclassification of Commercial Goods transportation Workers, the NYS DOL began also targeting employers that employ commercial trucking workers for independent audits.
New York Common Law Test

- Factors for determining whether the worker is an independent contractor or an employee
  - Determining whether the worker is subject to the control and supervision of the employer in performing the job, whether the work that is performed is part of the usual work of the employer’s business, and whether the worker has an independently established business offering services to the public, similar to the service they are performing for the employer.
New York State DOL Damages

- New York State DOL and Labor Auditing
  - Auditing generally begins with a written notice to the employer
  - Audits can begin because of a complaint or they may be randomly initiated

- There is a 6 year statute of limitation, where the NYS DOL can also investigate the employer’s compliance, among other items, with the Wage Deduction Statute and Wage Theft Protection Act
  - Recent amendments to the Wage Theft Protection Act increased the penalties for failing to provide a wage notice from $50 per week to $50 per day with a maximum of $5,000. The Amendment also provides for additional penalties of up to $20,000.